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# In the Supreme Court of the United States

OCTOBER TERM, 1947

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No. 712

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THE CURTISS CANDY COMPANY, PETITIONER

*v.*

EARL W. CLARK, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 336-341) is reported at 165 F. 2d 791.

### JURISDICTION

The judgment of the Emergency Court of Appeals was entered January 28, 1948 (R. 342), and a petition for rehearing (R. 343-351) was denied March 5, 1948 (R. 352). The petition for a writ of certiorari was filed April 2, 1948. The

jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App., Supp. V, 924(d)), making applicable Section 240 of the Judicial Code, as amended (28 U.S.C. 347).

### QUESTION PRESENTED

Whether the court below was correct in sustaining the validity of the General Maximum Price Regulation interpreted as prohibiting "the reduction of the weight of candy bars below the lowest actual running weight thereof during March 1942, regardless of any statement as to weight on the labels of the packages, unless the reduction of weight was accompanied by a corresponding reduction in the seller's March 1942 price."

### REGULATION INVOLVED

Section 1499.2 of the General Maximum Price Regulation, 7 F.R. 3153, as amended by Amendment No. 23, 7 F.R. 6615, so far as here relevant, read:

> *Maximum Prices for Commodities and Services; General Provisions.* Except as otherwise provided in this regulation, the "seller's" maximum price for any commodity or service shall be:
>
> (a) The highest price charged by the seller during March 1942:
>
> (1) For the same commodity or service; or
>
> (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; * * *

### STATEMENT

On December 9, 1943, the Price Administrator instituted a treble damage enforcement action against petitioner in the District Court for the Western District of Missouri,[1]

[1] Civil Action No. 1675. This action is still pending. Injunctive relief was also requested, but that phase of the case became moot with the end of price control.

alleging overceiling sales of candy bars in violation of the General Maximum Price Regulation (R. 294).[2] The complaint charged that during the period of the alleged violations, petitioner sold candy bars at the same prices it charged in March 1942, but the bars weighed less than the lowest weights of the same bars sold in that month. (Cf. interlocutory opinions of the district court, *Bowles* v. *Curtiss Candy Co.*, 55 F. Supp. 527, 529). On December 18, 1943 (R. 6), petitioner filed a protest against the General Maximum Price Regulation and Maximum Price Regulation No. 262.[3] The Administrator dismissed the protest, but, on a complaint by petitioner under Section 204(a) of the Emergency Price Control Act, the Emergency Court of Appeals remanded the case to the Administrator for consideration on the merits (R. 16). After extended proceedings (R. 7-284), the Administrator, adopting the report and recommendation of a board of review (R. 294-299), issued an order (R. 285) and accompanying opinion (R. 286-293) denying the protest. Petitioner thereupon filed a complaint in the Emergency Court of Appeals (R. 301-324). On January 28, 1948, the court below dismissed the complaint

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[2] The protest involved in the instant case was directed against both the General Maximum Price Regulation and Maximum Price Regulation No. 262 (7 F.R. 9244), which governed maximum prices for peanut candy, and it was assumed throughout the proceedings below that the enforcement action charged violations of the latter regulation (cf. R. 336). However, the complaint in the enforcement action charges violations only of the General Maximum Price Regulation. Maximum Price Regulation No. 262, as amended by Amendment No. 1, issued on December 23, 1942 (7 F.R. 10844), did not supersede the General Maximum Price Regulation as to petitioner's sales of peanut candy bars until December 31, 1942. The complaint in the enforcement action charges overceiling sales of peanut candy bars only from December 9 through 31, 1942, when the General Maximum Price Regulation was controlling. Since the present action has vitality only to the extent that it has bearing on the pending enforcement action, only the General Maximum Price Regulation is properly involved.

[3] Maximum Price Regulation No. 262 is not properly in issue here. See footnote 2, *supra*.

(R. 342), holding that the regulations as interpreted and applied to petitioner were valid (R. 336-341).

ARGUMENT

1. We are aware of no case other than the enforcement action now pending against petitioner in the District Court for the Western District of Missouri which could be affected by the decision below upholding the validity of the General Maximum Price Regulation as interpreted by the Administrator in the present proceeding. The conjectured possibility of the reimposition of price controls (see Pet. 7), and the even more conjectural assumption, necessarily implicit in petitioner's first reason for allowance of the writ, that any future price control will be identical with that under the expired Emergency Price Control Act, are hardly sufficient to warrant review by this Court of the very narrow issue here presented.

Nor is the decision of the court below in conflict with any other decisions (cf. Pet. 7). As we show below, so far as the Emergency Court of Appeals has expressed any opinion on matters which might be passed on by other courts, its view is in complete agreement with the decisions of such courts. Only the Emergency Court has jurisdiction to pass on the validity of the regulation, and, therefore, its decision on the issue of validity could not conflict with that of any other court.

Accordingly, we submit that, even without consideration of the obvious propriety of the decision of the court below, the case involves no question calling for further review by this Court.

2. So far as here relevant, the General Maximum Price Regulation provided that a " 'seller's' maximum price for any commodity * * * shall be * * * the highest price charged by the seller during March 1942 * * * for the

same commodity * * *." The Price Administrator construed this provision as prohibiting (R. 337)—

> * * * the reduction of the weight of candy bars below the lowest actual running weight thereof during March 1942, regardless of any statement as to weight on the labels of the packages, unless the reduction of weight was accompanied by a corresponding reduction in the seller's March 1942 price.[4]

This construction of the regulation has previously been upheld by the Circuit Court of Appeals for the Eighth Circuit in a case identical in all material respects to the enforcement action pending against petitioner. *Brown* v. *Mars, Inc.*, 135 F. 2d 843,[5] certiorari denied, 320 U. S. 798. The action against petitioner is pending in the District Court for the Western District of Missouri, the same court in which the *Mars* case originated. As observed by the court below (R. 338), the interpretation of the regulation adopted in the *Mars* case is binding on the court in the enforcement action against petitioner. Furthermore, the district court has already adopted the circuit court of appeals' construction of the regulation as applicable to petitioner. In denying petitioner's motions to dismiss the complaint, to require a bill of particulars, to suppress evidence and to dissolve the injunction theretofore issued, the district court said (*Bowles* v. *Curtiss Candy Co.*, 55 F. Supp. 527, 529):

> It is a simple charge that the identical articles were reduced in size and weight so as to have the effect of increasing the price. Such a procedure would have that effect. *Brown* v. *Mars, Inc.*, 8 Cir., 135 F. 2d 843. * * *

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[4] In November 1942 an official interpretation of general applicability to this effect was issued (R. 30; Pike & Fischer OPA Serv., p. 11:1133), and in September 1943 a similar interpretation was directed to petitioner's counsel in response to an inquiry by him (R. 30, 42).

[5] Reversing *Brown* v. *Mars, Inc.*, 49 F. Supp. 533 (W. D. Mo.)

> • • • Either [defendant] reduced the size and weight of its candies or it did not. If it did, under the *Mars* case, *supra*, it is liable to the relief sought by the Administrator. • • •

We submit that the district court's interpretation, following the binding precedent of the Eighth Circuit's *Mars* decision, is binding in the present proceeding (cf. R. 338). In *Van der Loo* v. *Porter*, 160 F. 2d 110, 112, certiorari denied, 329 U. S. 774, the Emergency Court of Appeals set forth the basis for this rule as follows:

> We have decided that where a District Court in an enforcement proceeding has interpreted a regulation as being applicable to one who later complains to this Court that the regulation is invalid, we must accept the District Court's interpretation. The reason is that if we should reach the conclusion, contrary to the District Court, that the regulation was not applicable to the complainant, he would find himself in a dilemma. Our decision as to the interpretation of the regulation would not bind the District Court. And we would not decide questions as to the validity of the regulation, which would be binding upon the District Court, since those questions from our point of view would have become moot. It is to assure a complainant in this court his right to a decision as to the validity of a regulation, that we accept the interpretation of the District Court. This situation is not altered in the present case by the fact that a protest was filed with the Administrator before the case was heard by the District Court.[6]

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[6] As observed by this Court in *Collins* v. *Porter*, 328 U. S. 46, quoted by the court below (R. 337-338), prior to the *Van der Loo* case, the Emergency Court of Appeals had applied the rule that it was bound by district court interpretations only in cases initiated by direct complaint under Section 204(e)(1) of the Act. However, even in the *Collins* case it was indicated that the Emergency Court of Appeals would determine an interpretative question in a proceeding under Section 204(a) to review the denial of a protest only if the issue came to it before the enforcement court has passed on it. We think the reasoning of the Emergency Court of Appeals in the *Van der Loo* case, which was decided after this Court's

But assuming, *arguendo,* as did the court below (see R. 338), that the interpretation of the regulation is open in this proceeding, we submit that the Administrator's interpretation, upheld by the Circuit Court of Appeals for the Eighth Circuit in the *Mars* case, by the district court in its interlocutory opinions in the enforcement action against petitioner, and by the court below (R. 338), is manifestly correct. As succinctly stated by the circuit court of appeals in the *Mars* case (135 F. 2d at 849):

> Any decrease in weight * * * without a corresponding decrease in price has clearly the same effect, on the purchaser and on the seller, as an increase in price—less is sold for the same money.

Petitioner contends, however, that in the application of this interpretation, label weights rather than actual weights should be considered determinative of ceiling prices (see Pet. 18-19, 23). This contention was properly rejected by the court below (R. 338). The record in this case clearly shows that historically actual weights of candy bars exceeded the advertised or label weights (R. 81, 82, 338). Petitioner's own production specification sheets show that before price control its actual production goals were for weights as much as 20% above label weights (R. 174-206; cf. *Brown* v. *Mars, Inc.,* 135 F. 2d at 853). The only reasonable interpretation of a regulation freezing prices at the level at which the same commodities were sold during a base period is that the prices be tied to the actual weights of the commodities, rather than to fictitious label weights which, by design, varied from the actual weights.

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decision in the *Collins* case, is entirely sound, and requires the adoption of a rule that the interpretation of a regulation is to be decided by either the enforcement court or the Emergency Court of Appeals, whichever first has the issue presented to it, and that the ruling of either court so made is binding on the other. See *Chippewa County Cooperative Dairy* v. *Clark,* 163 F. 2d 753, 756 (E.C.A.)

Petitioner also asserts that the court below wrongly interpreted the regulation (Pet. 6)—

> • • • to the effect that the average weight of a packaged food product produced in March 1942 is the applicable ceiling price, and that to determine compliance with these regulations subsequent average weights shall not be less than the base period (March 1942) average.

However, the court below did not purport to hold that petitioner's maximum prices were to be determined by reference to any average weights. The court merely interpreted the regulation as prohibiting reductions in actual weights of petitioner's candy bars without corresponding decreases in price (R. 337); it at no point indicated that petitioner's maximum price for sales of any type of candy bar was its average price therefor during March 1942. The regulation clearly established petitioner's ceiling price for each type of candy bar at its highest price therefor during March 1942. The Administrator never took the position that under a freeze type regulation such as the General Maximum Price Regulation the ceiling price was established by reference to a seller's average price during the base period.[7] In the present case, the question of "average weights" was raised by the evidence attached to the complaint in the enforcement action. The evidence presented by the Administrator in support of the allegations of unauthorized reductions in actual weight consists largely of petitioner's weight records, kept in the usual course of business. Petitioner's weight records are kept in terms of daily

[7] *Bowles* v. *Kennemore*, referred to by petitioner (Pet. 4, 10-11), correctly sets forth the Administrator's consistent recognition that under a freeze regulation a seller's maximum price was the highest price at which he sold the same commodity in March 1942. (Petitioner cites the circuit court of appeals' opinion, but his discussion is of the district court's opinion on remand, which, although not reported in the official reports, appears at 1 Price Control Cases par. 51,164 (p. 51,558).)

and weekly averages. Whether such records are admissible and sufficient evidence to prove the allegations of reductions in actual weights is a question to be determined by the court in the enforcement action.[8] Cf. *Belkin* v. *Fleming*, 161 F. 2d 197, 199 (E. C. A.). The court below expressed no opinion, explicit or implicit, on this evidentiary issue. Whether any reductions shown are such as to fall within the *de minimis* rule[9] (see Pet. 5, 19) does not go to the question of validity, or even of interpretation, of the regulation. Whether a violation is of sufficient significance to warrant enforcement action is a matter within the sole and final judgment of the Administrator. *Bowles* v. *Jones*, 151 F. 2d 232, 234 (C. C. A. 10).

3. Petitioner's attacks upon the validity of the regulation as interpreted and applied in this case are equally without merit.

Petitioner contends that the regulation was unlawfully discriminatory against it. In support of this assertion it adverts to other regulations and orders which it alleges made allowances for "tolerances" and made label weight controlling (Pet. 20-24). As said by the court below (R. 340), an analysis of the regulations and orders referred to by petitioner discloses that there is no basis for a contention that the Administrator afforded more favorable treat-

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[8] The circuit court of appeals in the *Mars* case, *supra*, after full consideration, upheld the use of evidence of average weights to prove actual weights. 135 F. 2d 843, 854.

The district court in the enforcement action underlying the present proceeding has already rejected petitioner's argument that the "action was predicated upon averages and not specific weights." The court, relying on the opinion of the circuit court of appeals in the *Mars* case, has ruled that the statements of average weights attached to the complaint in the enforcement action "had evidential or probative value." 55 F. Supp. at 530-531.

[9] The circuit court of appeals in the *Mars* case said (135 F. 2d at 849): "The degree of decrease in weight with resultant effect of increase in price is not material * * *."

ment to other people than to petitioner. (Cf. Administrator's opinion on denying the protest, R. 289-291, where the cited regulations and orders are briefly analyzed.)

Petitioner's claim of invalid discrimination because it and Mars, Inc., are stated to be the only persons against whom enforcement actions have been brought in the circumstances here presented (Pet. 27-32), is wholly irrelevant to the question of validity. The court below correctly disposed of this contention summarily, holding that review of the enforcement policy and activities of the Administrator was not within its jurisdiction (R. 340). Cf. *Bowles* v. *Jones, supra.* In any event, the record contains no evidence that other companies violated the regulation in the manner charged against Mars and petitioner. Although admittedly no producer of packaged food commodities could assure the precise weight of each item within hundredths of ounces (see paragraph 6(i) of the answer to the complaint, R. 330-331), compliance with the regulation could readily have been achieved by the simple expedient of maintaining the same production specifications and manufacturing methods as the producer had in effect in 1942. It must be assumed, in the absence of any contrary showing, that other producers followed this course, rather than reducing the target weights of their products, as the record shows petitioner did (R. 174-206).

Petitioner's objection that "new" products were more liberally priced under the regulation than were petitioner's (Pet. 25) was not set forth in the complaint in the court below (R. 301-324) and is not discussed in the court's opinion (R. 336-341). In any event, it is wholly unsupported. The sole basis for this assertion presented by petitioner is the Recommendations of the OPA Candy Bar Manufacturers' Industry Advisory Committee, made in August 1944 (R. 51-52). At no time has there been any showing that the regulation was arbitrary and capricious

in the respective methods adopted for establishing maximum prices for commodities produced in March 1942 and for those introduced on the market thereafter. Cf. *Modern Mfg. Co.* v. *Fleming*, 160 F. 2d 892, 896 (E. C. A.), certiorari denied, 331 U. S. 850.

Petitioner argues (Pet. 32-33) that the General Maximum Price Regulation was invalid because the Administrator did not publish a determination that it conformed with the provisions of Section 3(c) of the Emergency Price Control Act of 1942 [10] and Section 3 of the Stabilization Act of 1942.[11] We submit, first, that as a producer of processed commodities, petitioner has no standing to raise an objection based on asserted non-compliance with provisions calculated solely to protect agricultural producers. Cf. *Chippewa County Cooperative Dairy* v. *Clark, supra*, 163 F. 2d at 759. In any event, petitioner has made no showing of non-compliance. *Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50, relied on by petitioner (Pet. 33), is not in point, since the statutory provision there involved [12] imposed a restriction

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[10] 56 Stat. 23, 50 U.S.C. App., Supp. V, 903(c):

"No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a)."

[11] 56 Stat. 765, 50 U.S.C. App., Supp. V, 963: "• • • no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: • • •"

[12] Section 2(j)(3), added to the Emergency Price Control Act of 1942 by Section 5(a) of the Act of July 16, 1943, 57 Stat. 566: "Nothing in this Act shall be construed • • • (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity.

on the Administrator's authority to take certain action "unless [he] shall determine" the existence of a specified condition. The provisions relied on by petitioner (footnotes 10 and 11, *supra*) merely set forth substantive standards to be followed in establishing maximum prices for certain commodities and did not contain any requirement of "findings" or "determinations" by the Administrator. Moreover, it appears that the Administrator did in fact publish a determination which would have satisfied a requirement of findings had there been one. (Cf. Administrator's opinion on denying the protest, R. 287-288; report and recommendation of the board of review, R. 296-297.)

## CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. The petition should, therefore, be denied.

Respectfully submitted.

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